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Supreme Court, U.S.
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No. 04-1106

IN THE

SUPREME COURT OF THE UNITED STATES

GENE A. FOLDEN, COASTAL COMMUNICATIONS ASSOCIATES, AND JUDITH A. LONGSHORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners, Gene A. Folden, Coastal Communications Associates, and Judith Longshore, hereby reply to the Brief for the United States in Opposition ("Br.").

COUNTERSTATEMENT

1. The Federal Communications Commission ("FCC" or "Commission") breached implied-in-fact contracts to award cellular licenses for seven Rural Service Areas ("RSAs") in accordance with (or obeying) lottery rules that required it to hold relotteries. Respondent notes that the FCC's rules did not specify when relotteries were to be held. *See* Br. 2. However, on July 12, 1996, the FCC announced that it had selected September 18, 1996 as the date on which it would fulfill its obligation to hold a relottery for six of the seven RSAs. *See* App. 91a (¶ 68).

Over a five-day period in August 1996, a former FCC attorney representing Cellular Communications of Puerto Rico, Inc. ("CCPR"), made ex parte presentations to the legal advisors to Chairman Reed Hundt (an outspoken critic of lotteries) and Commissioners James Quello, Rachelle Chong and Susan Ness. *See* App. 90a-92a (¶¶ 63, 65, 67, 69-72). CCPR's counsel argued that the scheduled relottery should not be held for the six RSAs, including the Puerto Rico 5 - Ceiba RSA where an affiliate of CCPR was the interim operator. *See id.* 89a (¶ 56), 92a (¶¶ 70-72).

2. The Federal Circuit found that the FCC made the decision not to hold RSA relotteries, and that its decision was "announced" by the Commercial Wireless Division ("Division") of the FCC's Wireless Telecommunications Bureau ("Bureau" or "WTB") on September 10, 1996. *See id.* 9a-10a, 29a n.14, 32a. In fact, the Division notified the public that the relottery scheduled for the following week was "postponed." *See id.* 92a (¶ 74). No reason was given for the postponement. *See id.*

Respondent contends the Bureau postponed the relottery

in order to consider an ex parte petition CCPR filed on September 9, 1996, the day before the relottery was "postponed." *See* Br. 2. The facts Petitioners allege support the inference that CCPR's ex parte presentations to FCC decision-makers in August 1996 led to the decision to end the lottery process, not a petition CCPR filed the day before the scheduled relottery was "postponed." Moreover, on October 24, 1996, when it finally disclosed that CCPR's petition had been filed, the Division did not state that the relottery was postponed to allow for consideration of the petition.[1] That explanation was first offered by the FCC more than four years later, when it claimed the WTB postponed the relottery to "preserve the issue raised in CCPR's petition."[2] But the FCC's contractual and legal obligation was to adhere to its lottery rules that were in effect and required a relottery. *See* Pet. 11 n.11.

3. According to Respondent, before the FCC could act on CCPR's petition, Congress enacted the Balanced Budget Act of 1997 ("1997 Budget Act"), which repealed the FCC's authority to conduct lotteries. *See* Br. 2. The 1997 Budget Act was passed on August 5, 1997, approximately a year after the FCC decided not to hold relotteries and months after its final breach of the implied contracts. *See* App. 18a-19a, 93a (¶ 78). On April 2, 1999, the WTB dismissed CCPR's petition as "moot." *Certain Cellular RSA Applications*, 14 F.C.C.R. 4619, 4621 n.12 (WTB 1999) ("*Dismissal Order*"), *reconsideration denied*, 16 F.C.C.R. 4860 (WTB 2001) ("*Reconsideration Order*"), *application for rev. denied*, 17 F.C.C.R. 8508 (2002) ("*Final Order*").

4. Petitioners brought their breach-of-contract claims to the Court of Federal Claims seeking only money damages. *See* App. 110a-111a. They had no interest in obtaining judicial review of any FCC decision or order. Nevertheless,

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[1] *See CCPR Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Cellular RSAs*, 11 F.C.C.R. 13847, 13847-48 (1996).

[2] *Implementation of Competitive Bidding Rules to License Certain RSAs*, 16 F.C.C.R. 4296, 4299 (2001).

Respondent misled the Court of Federal Claims to conclude that Petitioners' complaint seeks judicial review of two WTB orders issued in April 1999 that dismissed their RSA lottery applications. *See* App. 62a-63a. The Federal Circuit disagreed. It found that the complaint "plainly represents a challenge to the Commission's failure to hold relotteries for the seven RSA licenses." *Id.* 27a n.13. It held that Petitioners seek judicial review of the FCC's decision not to hold relotteries, *see id.* 29a n.14, 34a, which the Division announced on September 10, 1996. *See id.* 9a, 29a n.14. It found the FCC's decision "in fact" denied Petitioners' applications, "albeit without issuing a formal order." *Id.* 32a.

5. Respondent misstates the case when it claims the Federal Circuit "concluded that the orders at issue fell within the exclusive jurisdiction of the D.C. Circuit" under § 402(b) of the Communications Act of 1934, as amended ("Act"). Br. 5. The court actually concluded that "despite the absence of a formal 'decision' or 'order' by the Commission, the decision not to hold relotteries for the seven RSA licenses at issue constituted an appealable decision within the meaning of subsection 402(b)." App. 29a n.14.[3] The FCC's off-the-record decision in 1996 to breach its implied contracts never became part of an FCC order.

ARGUMENT

1. Respondent repeats the misstatements that began the transformation of Petitioner's breach-of-contract suit into an appeal from an unappealable FCC decision. *Compare* Br. 9-10 & n.4 *with* Pet. 28-29. Respondent persists in claiming Petitioners' complaint clearly seeks "review of staff orders of the WTB," including "staff orders specifically rejecting [their] contract claims," and asks that the Bureau's "rejection" of their claims be "overturn[ed]." Br. 9-10.

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[3] Respondent also misstates that the court held that the D.C. Circuit has exclusive jurisdiction to review "challenges to the Bureau's decision not to hold relotteries." Br. 7. The court concluded the FCC made that decision. *See* App. 29a n.14. The WTB lacked the delegated authority to end the relottery process. *See* 47 C.F.R. § 0.291(a)(2) (1996).

First, Petitioners were not parties to any proceedings before the WTB. As they explained, High Tower Communications, Inc. ("High Tower") made an implied-in-fact contract claim, but not to the Bureau. *See* Pet. 7-8, 29. As one can plainly see, Petitioners' complaint unmistakably alleges that High Tower asked for Bureau reconsideration on the ground "it had not been allowed to participate in the relotteries for which it had contracted." App. 94a (¶ 83). The complaint alleged that the WTB "summarily rejected High Tower's contract claim." *Id.* 95a (¶ 89). The complaint is consistent with the *Reconsideration Order*. *See* 16 F.C.C.R. at 4862 n.12 ("High Tower provides no support for its claim that the Commission 'promised' to process applications in a certain way in exchange for the payment of application fees.")

Petitioners allege that High Tower first made an implied-in-fact contract claim in an application for *Commission* review of the *Reconsideration Order*. *See* App. 96a (¶¶ 92, 93); Pet. 7-8. That allegation is confirmed by the *Final Order* in which the Commission discusses High Tower's implied-in-fact contract and damages claims at length. *See* 17 F.C.C.R. at 8514-17.[4] Thus, the agency's reported decisions confirm the Bureau did not address or reject an implied-in-fact contract claim founded on the common law of lotteries. *Compare* 16 F.C.C.R. at 4862 & n.12 *with* 17 F.C.C.R. at 8514-17 & n.56. No "staff orders specifically rejecting [P]etitioners' contract claims" exist, and their complaint cannot be read to ask the Court of Federal Claims to "overturn" any Bureau action. *See* App. 110a-111a. Respondent's claims to the contrary taint the Federal Circuit's determination that Petitioners seek judicial review instead of money damages. *See* App. 12a & n.5, 25a n.11 (discussing Petitioners' "failure" to preserve their right to

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[4]Nine months after Petitioners filed suit, the FCC confirmed that it lacks jurisdiction to adjudicate claims against the United States for money damages based on its breach of implied-in-fact contracts. *See Final Order*, 17 F.C.C.R. at 8515. Likewise, the D.C. Circuit is without jurisdiction to award money damages. *See* Pet. 23-24.

judicial review by seeking FCC review of the WTB's orders).

2. Respondent incorrectly contends that the Federal Circuit's decision does not conflict with any decision of any other court of appeals. *See* Br. 7. The court below decided that a complaint that explicitly seeks $144 million in monetary relief from the federal government does not invoke the Tucker Act jurisdiction of the Court of Federal Claims. *See* App. 13a. That decision directly conflicts with the D.C. Circuit's rule that a claim is subject to the Tucker Act jurisdiction of the Court of Federal Claims "if, in whole or in part, it explicitly or 'in essence' seeks more than $10,000 in monetary relief from the federal government." *Kidwell v. Dep't of the Army Bd. for Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995).

3. The Federal Circuit held that the exclusive appellate jurisdiction of the D.C. Circuit under the Act "preempts" the exclusive original jurisdiction of the Court of Federal Claims under the Tucker Act. App. 27 n.13. The court's decision on an important jurisdictional issue conflicts with this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) and ignores the "comprehensive framework" established by Congress in the Tucker Act and the Federal Courts Improvement Act. *See United States v. Hohri*, 482 U.S. 64, 73 (1987).

In *Steel*, this Court held that every federal appellate court has the threshold obligation to establish both its own jurisdiction and that of the lower court. *See* 523 U.S. at 94-96. Respondent argues that the Federal Circuit met that obligation simply by deeming Petitioners' "putative breach-of-contract action" to be subject to the D.C. Circuit's exclusive jurisdiction under § 402(b). Br. 12. That argument is based on the false premise that the D.C. Circuit's exclusive jurisdiction trumps the exclusive jurisdiction of the Court of Federal Claims and the Federal Circuit over nontort claims against the United States for more than $10,000. *See* 28 U.S.C. §§ 1295(a)(3), 1491(a)(1), 1346(a)(2); *Hohri*, 482 U.S. at 72.

Petitioners make the type of claims (breach of implied contract and takings claims) against the United States that are covered by the Tucker Act and they seek the specific relief ($144 million in damages) the Tucker Act provides. *See* App. 13a. Hence, they invoke the jurisdiction of the Court of Claims unless all their claims are clearly "frivolous or immaterial." *Steel*, 523 U.S. at 89-90. If their complaint succeeds in stating a single nonfrivolous claim against the government for more than $10,000 in damages, the D.C. Circuit's *Kidwell* rule applies, leaving that court without jurisdiction irrespective of § 402(b). *See* 56 F.3d at 284. Thus, the Federal Circuit was obliged under *Steel* to determine whether Petitioners present any claim cognizable under the Tucker Act.

4. A major concern of Congress in creating the Federal Circuit was the "special need for nationwide uniformity" in the adjudication of nontort claims against the United States. *Hohri*, 482 U.S. at 71. In order to "ensure that a central judicial body adjudicates most claims against the United States Treasury," *Kidwell*, 56 F.3d at 284, Congress created "exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *Hohri*, 482 U.S. at 72-73 (emphasis in original). Given the "comprehensive framework" established by Congress and its "strong expressions of need for uniformity in the area," this Court adopted the presumption that if Congress intended that there be any exceptions to the Federal Circuit's exclusive Tucker Act jurisdiction, it would have made its intention "explicit, rather than left to inferences drawn from loose language." *Id.* 482 U.S. at 73.

Respondent asks this Court to draw the same type of jurisdictional inference that was rejected in *Hohri*. It argues the creation of a "comprehensive statutory and regulatory scheme" that directs "certain types of claims" to be litigated in the D.C. Circuit supports the inference that Congress has withdrawn Tucker Act jurisdiction "over those claims." Br. 16. However, the D.C. Circuit does not have exclusive jurisdiction over "certain types of claims." Under § 402(b), the D.C. Circuit has jurisdiction over appeals taken from

FCC "decisions and orders" in certain types of *cases*. *See* 47 U.S.C. § 402(b). It is the Tucker Act that affords the Court of Federal Claims exclusive jurisdiction over certain types of *claims* against the federal government. *See* 28 U.S.C. § 1491(a)(1). Moreover, the exclusive jurisdiction of the D.C. Circuit under § 402(b) is a judicial creation, *see* Br. 7-8, but Congress explicitly gave the Federal Circuit "exclusive jurisdiction ... of an appeal from a final decision of the ... Court of Federal Claims." 28 U.S.C. § 1295(a)(3). Under the rule that "a precisely, detailed statute preempts more general remedies," *Brown v. GSA*, 425 U.S. 820, 834 (1976), the jurisdiction given the Court of Federal Claims, and the exclusive jurisdiction expressly given the Federal Circuit, specifically over contract claims against the United States for more than $10,000, appears to trump whatever jurisdiction the D.C. Circuit could have over those claims as "ancillary" to the cases identified in § 402(b). Be that as it may, § 402(b) provides no basis to infer that Congress has withdrawn Tucker Act jurisdiction over Petitioners' breach-of-contract claims. *See* Pet. 22-25.

5. As a "special review statute," § 402(b) "cuts off" original jurisdiction in other courts in all cases it covers, *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979), but § 402(b) only covers final FCC decisions and orders. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). Moreover, finality pursuant to the Administrative Procedure Act ("APA") is a "crucial pre-requisite" to ripeness for judicial review. *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003). But on August 8, 2001, when Petitioners filed suit, no final FCC decision or order existed that related to their claims. *See* App. 67a, 96a (¶ 94). As the trial court acknowledged, the D.C. Circuit could not have taken jurisdiction under § 402(b). *See id.* 67a. Under the "time-of-filing" rule,[5] the Court of Federal Claims unquestionably has exclusive jurisdiction to the extent Petitioners make nonfrivolous Tucker Act claims.

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[5] Subject-matter jurisdiction of the Court of Federal Claims turns on the facts as they exist when the complaint is filed. *See Keene Corp. v. United States*, 508 U.S. 200, 207-08 & n.3 (1993).

6. To invoke the D.C. Circuit's exclusive jurisdiction under § 402(b), a notice of appeal must be filed with the court "within thirty days from the date upon which public notice is given of the decision or order complained of." 47 U.S.C. § 402(c). The FCC never provided the notice necessary for its 1996 decision to become an "appealable decision" within the meaning of § 402(b). App. 29a n.14. Respondent does not dispute that the FCC's decision was "made off-the-record, never publicly acknowledged, and not subject to judicial review." Pet. 30. No decision or order was ever issued by the FCC or the WTB for the stated reason that the applications for the seven RSA licenses had in fact been denied in 1996 pursuant to an FCC decision not to hold relotteries.[6] Because judicial review of the reasonableness of an FCC licensing decision under § 402(b) is limited to the agency reasoning that appears in the FCC's order, *see, e.g., Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1336-37 (D.C. Cir. 2004), the FCC's 1996 decision was never subject to the D.C. Circuit's exclusive jurisdiction.

7. Respondent defends the determination below of the "true nature" of Petitioners' claims, but cannot articulate the legal standard the court employed. *See* Br. 9-10. The court's *ipse dixit* that Petitioners' "action plainly represents a challenge to the Commission's failure to hold relotteries" does not implicate the exclusive jurisdiction of the D.C. Circuit. App. 27a n.13. To fall within the D.C. Circuit's jurisdiction, a claim must be for the *same relief* § 402(b) provides. Thus, only a challenge to the lawfulness of an FCC order subject to review under § 402(b) must be made in the D.C. Circuit. *See Rochester*, 603 F.2d at 937. Petitioners

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[6] When it dismissed the RSA lottery applications in 1999, the WTB represented that it made the decision to dismiss the RSA lottery applications under its delegated authority, because the 1997 Budget Act had repealed the FCC's lottery authority. *See Dismissal Order*, 14 F.C.C.R. at 4620-21. It repeated that claim in 2001. *See Reconsideration Order*, 16 F.C.C.R. at 4861-62. So did the FCC when it finally reviewed the WTB's orders in 2002. *See Final Order*, 17 F.C.C.R. at 8510. The FCC never admitted that its decision not to hold relotteries was made *before* the 1997 Budget Act was enacted.

mount no such challenge.[7] Furthermore, only "adequate statutory review is exclusive." *Rochester*, 603 F.2d at 935. Since the FCC precluded adequate statutory review of its 1996 decision, Petitioners were entitled to pursue "any applicable form of legal action ... in a court of competent jurisdiction." 5 U.S.C. § 703.

8. Respondent contends that regulatory lotteries are not "properly analyzed" as implied-in-fact contracts, the breach of which subjects the agency to a suit for money damages. *See* Br. 13. However, Congress is presumed to have been aware that lotteries are contractual arrangements under the common law when it gave the FCC the option to use lotteries. *Cf., United States v. Texas*, 507 U.S. 529, 534 (1993). Yet, it took no steps to exempt the FCC from liability under the Tucker Act. Moreover, this Court has recognized that if an aggrieved party is able to establish the existence of an implied-in-fact contract with a federal agency, that party can bring suit under the Tucker Act. *See Kosak v. United States*, 465 U.S. 848, 860 n.22 (1984). Finally, ordinary contract principles apply to public contracts involving regulatory matters. *See United States v. Winstar Corp.*, 518 U.S. 839, 870-71 (1996).

9. Respondent concedes only that there may be a "consensus that recreational lotteries subject sponsor States to suit under contract principles." Br. 13. It is unclear what constitutes a "recreational" lottery, but it is the unanimous view of the many courts that have addressed the issue that principles of contract law apply to lotteries run by, or on

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[7] To decide if Petitioners' suit is covered by § 402(b), the Federal Circuit should have followed *Rochester*, since that case involved a district court action which the Federal Circuit viewed as "indistinguishable" from Petitioners' breach-of-contract suit. App. 25a. The plaintiffs in *Rochester* asked the court to set aside the FCC's grant of a construction permit, *see* 603 F.2d at 931, the very same relief § 402(b) provides. *See* 47 U.S.C. § 402(b)(6). In contrast, Petitioners' suit against the United States seeks money damages, a form of judicial relief that is not available under § 402(b). The suit also does not put the lawfulness of an FCC order at issue or ask that an FCC order be held "unlawful and set aside." 5 U.S.C. § 706(2).

behalf of, state governments. *See* Pet. 16-17 & n.16. Thus, under the law as it exists today, the general rules of contract law apply to government-run lotteries. Respondent and two federal courts below could not cite a single case from any jurisdiction to the contrary.

Framed by the same contract principles that courts have uniformly applied to lotteries, Petitioners' contract claims are not foreclosed by any precedent and cannot be dismissed as jurisdictionally frivolous. *See* Pet. 9-10, 16-17, 19. Respondent notes, however, that Petitioners do not cite to any authority specifically holding that principles of contract law apply to "lotteries conducted for regulatory purposes." Br. 13. Of course, Respondent cites no authority that exempts "regulatory" lotteries from the contract principles that are applied to all other lotteries. Evidently, the precise issue of whether contract principles govern federal agency-run lotteries is one of first impression. That issue is within the "unique expertise" of the Court of Federal Claims to address in the first instance. *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 78 (D.C. Cir. 1985).

10. Respondent argues that the FCC's authority to change its rules effectively precluded it from making a contractual promise to award RSA licenses by lotteries and prevented applicants from having a "reasonable" expectation that the FCC would be bound by its promise. Br. 13-16. However, the FCC's promise to hold lotteries in accordance with its lottery rules was (unsurprisingly) a promise to abide by those rules until amended or revoked. And the FCC was legally bound to do just that. *See* Pet. 11 n.11. By offering to hold lotteries under its rules in 1988, the FCC manifested its intention to be bound by its rules until they were changed pursuant to the APA. *See* 5 U.S.C. § 553. Because the FCC was "bound to adhere to its own rules and procedures," *Teleprompter Cable Communications Corp. v. FCC*, 565 F.2d 736, 742 (D.C. Cir. 1977), applicants had a "reasonable expectation" that the FCC would obey its lottery rules and procedures, and they were entitled to act in reliance on that expectation. *Gardner* v. *FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). When they did, implied contracts were formed.

Respectfully submitted,

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